

International Brotherhood of Painters and Allied Trades of the United States and Canada, Local Union No. 91, AFL-CIO and Frank M. Burson, Inc. and Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 39, AFL-CIO. Case 6-CD-751

December 23, 1982

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge by Frank M. Burson, Inc., herein called the Employer, alleging that International Brotherhood of Painters and Allied Trades of the United States and Canada, Local Union No. 91, AFL-CIO, herein referred to as the Painters Union, violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to its members rather than to employees represented by Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 39, AFL-CIO, herein referred to as the Plasterers Union.

Pursuant to notice a hearing was held before Hearing Officer Alvin L. Pittman on August 16, 1982. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated that Frank M. Burson, Inc., is an Ohio corporation with its principal place of business located in Martins Ferry, Ohio, where it is engaged in the construction business as an interior walls and ceiling and exterior cement finishing contractor.

The parties further stipulated that during the past 12-month period, a representative period, the Employer purchased goods and materials from outside the State of West Virginia, in excess of \$50,000, for use at the disputed West Virginia construction projects; and that the Employer is a member of the Ohio Valley Construction Employers Council, Inc., which exists for the purpose, *inter alia*, of repre-

senting its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations. Accordingly, we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated and we find that the Painters Union and the Plasterers Union are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. Background and Facts of the Dispute

The Employer is engaged in the construction business as an interior walls and ceiling and exterior cement finishing contractor. The instant dispute involves the operation of the Employer in perfataping drywalls at the Adena Hills and Hawley Building jobsites around Wheeling, West Virginia. The work of perfataping drywalls involves the covering of nails, joints, and seams which result from the installation of drywall. After the drywall is hung, a cement-like compound is applied to seal the joints and, while this compound is wet, perfatape is placed over it. Thereafter two coats of softer cement-like compound are applied to the tape, allowing time for one coat to dry before the second is applied. After the second coat of this compound dries, the tape is sanded smooth.

The Employer has had collective-bargaining agreements with the Plasterers Union, under which the Union has performed the work of perfataping drywall since the 1950's. It has never had such an agreement with the Painters Union.

On March 17, 1982, the Painters Union business agent contacted the Employer's representative, the executive director of the Ohio Valley Construction Employers Council, and told him that, unless the Employer assigned the perfataping work at the Adena Hills and Hawley projects to employees represented by the Painters Union, the painters would picket both construction projects, contending that members of the Painters Union have always performed this work in its contractual jurisdiction; i.e., construction work done in and around the city of Wheeling, West Virginia.

In testimony at the instant hearing, the business agent for the Painters Union admitted so stating to the Employer's representative. On March 18, 1982, the following day, the Employer filed the instant charge, alleging a violation of Section 8(b)(4)(D) of the Act.

B. *The Work in Dispute*

The record shows that the dispute encompasses the work of perfataping drywall at the Adena Hills Housing Project in Moundsville, West Virginia, and the Hawley Building in Wheeling, West Virginia.

C. *The Positions of the Parties*

The Employer and the Plasterers Union contend that the work of perfataping should be awarded to employees represented by the Plasterers Union, based on collective-bargaining agreements over the past 30 years; the employer and area practice; the Employer's preference; economy and efficiency of operation; and job impact.

The Painters Union argues that the disputed work should be awarded to employees represented by it inasmuch as painters have always performed this work in the area of its contractual jurisdiction. Further, the Painters Union contends that the assignment of this work to it would be more economical since the base rate of pay for painters is less than plasterers, and because of the job impact on its members.

D. *The Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

The parties stipulated that there was a jurisdictional dispute; that the dispute has not been resolved; and that there was no voluntary method for adjustment of the dispute.¹

Based on the foregoing, and the record as a whole, we find that the parties have not agreed upon a method for the voluntary adjustment of the dispute, and that there is reasonable cause to believe that an object of the threats of the Painters Union was to force the Employer to assign the disputed work to employees represented by it, and that a violation of Section 8(b)(4)(D) has occurred.

Accordingly, we find that the dispute is properly before the Board for determination under Section 10(k) of the Act.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of the disputed work after giving due consideration to relevant factors.² The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.³

The following factors are relevant in making the determination of the dispute before us:

1. *Collective-bargaining agreements*

The record is clear that the Employer has had a collective-bargaining relationship with the Plasterers Union since the 1930's, while, during the same period, the Employer never has had an agreement with the Painters Union. While the Employer has utilized employees represented by the Painters Union on approximately three occasions, it has done so only when a sufficient number of plasterers were unavailable to staff current projects.

Moreover, while the Painters Union contends that its members have performed the disputed work in its jurisdiction, the record shows that the Painters Union has never had a collective-bargaining agreement with the instant Employer.

Accordingly, we find that the factor of the collective-bargaining contracts favors an assignment to employees represented by the Plasterers Union.

2. *Employer and area practice*

The record shows that the Employer herein assigned the work in dispute to employees represented by the Plasterers Union; has traditionally assigned perfataping to members of the Plasterers Union by contract for some 30 years; and during that time has utilized members of the Painters Union on only three occasions.

In light of the above, we find that the factor of employer practice favors an award of the disputed work to employees represented by the Plasterers Union.

With respect to area practice, the record is clear that practice in the Wheeling, West Virginia, area depends upon which of the two main local contractors, the instant Employer or the J. M. Valan Company, receives the contract for installation of drywall, and therefore the work of perfataping. The consistent practice has been that, if the Employer here involved secures the contract, the dis-

¹ While the Painters Union contends that there was an agreement between the International Unions regarding assignment of perfataping work, the record shows such memorandum of understanding was terminated some years ago. Moreover, the Painters Union stipulated that there was no voluntary method for adjustment of the instant dispute.

² *N.L.R.B. v. Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO* [Columbia Broadcasting System], 364 U.S. 573 (1961).

³ *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

puted work is performed by employees represented by the Plasterers Union. If the Valan Company obtains the contract, it assigns the work to employees represented by the Painters Union.

Accordingly, we find that the factor of area practice does not favor award of the disputed work to employees represented by either the Plasterers Union or Painters Union.

3. Relative skills

Both the Plasterers Union and Painters Union have training programs for employees performing the work of perfataping. Further, both Unions locally, as well as nationally, perform perfataping work.

Accordingly, we find that the factor of relative skills does not favor award of the disputed work to employees represented by either the Plasterers Union or Painters Union.

4. Economy and efficiency of operation

The record shows that the Employer herein utilizes plasterers to perform various duties relating to plastering as well as perfataping. It was estimated that 90 percent of the work performed by plasterers involves some perfataping. If the Employer were required to assign the disputed work to painters, it would necessarily require the Employer to add an additional complement of employees, since the painters do not perform the plastering function. By using plasterers to perform both functions, the Employer has greater flexibility and better utilization of employees.

While the Painters Union contends that economy of operations favors an award to it due to its lower wage rate, the Board has held that wage differentials do not constitute a proper basis for awarding disputed work.⁴

Accordingly, we find that the factor of economy and efficiency of operations favors award of the disputed work to employees represented by the Plasterers Union.

5. Job impact

The instant Employer testified that, as noted above, employees represented by the Plasterers Union perform work duties relating to both plastering and perfataping. If it were forced to assign the disputed work to the painters, it would have to displace some of its employee complement as presently constituted.

On the other hand, there has been no showing that those employees represented by the Painters

Union have been adversely affected by the Employer's assignment of the disputed work.

Accordingly, we find that the factor of job impact favors award of the disputed work to employees represented by the Plasterers Union.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors, we conclude that employees who are represented by Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 39, AFL-CIO, are entitled to perform the work in dispute based on the factors of past employer practice, collective-bargaining agreements, employer preference, economy and efficiency of operation, and job impact. In making this determination, we are awarding the work in dispute to employees who are represented by that Union, but not to that Union or its members. This determination is limited to the particular controversy which gave rise to this dispute.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board hereby makes the following Determination of Dispute:

1. Employees of Frank M. Burson, Inc., who are currently represented by Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 39, AFL-CIO, are entitled to perform the work of perfataping drywall done by the Employer at the Adena Hills Housing Project in Moundsville, West Virginia, and at the Hawley Building in Wheeling, West Virginia.

2. International Brotherhood of Painters and Allied Trades of the United States and Canada, Local Union No. 91, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Frank M. Burson, Inc., to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, International Brotherhood of Painters and Allied Trades of the United States and Canada, Local Union No. 91, AFL-CIO, shall notify the Regional Director for Region 6, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.

⁴ *Theatrical Protective Union No. One, I.A.T.S.E., AFL-CIO (American Broadcasting Company)*, 249 NLRB 1090 (1980).